

The Texas Board of Chiropractic Examiners (Board) proposes new 22 TAC §80.5 (Peer Review Process). The current §80.5 is being repealed in a separate rulemaking action.

Texas Occupations Code §201.210 requires the Board to set up a system where the Board may draw on outside chiropractic expertise (an “expert” reviewer of patient records) to help in investigations involving standard of care allegations. The Board adopted such a system through §80.5.

However, the use of the term “expert” in both the statute and the Board’s current rule has caused confusion for some complainants as to the exact role and authority of the reviewer. Some complainants have thought that the reviewer’s job is to assign legal liability for any injury the complainant may have suffered as the result of a licensee’s failure to meet the profession’s standard of care; in effect, some complainants believe that the reviewer is the same as an expert witness in a trial court who is called upon to render an opinion as to causation (and thus assign legal liability). That is not the case with the Board’s reviewers.

Unlike an expert witness, a Board reviewer does not examine any patient; the reviewer only performs a review of records. Also, a Board reviewer is not statutorily authorized to render an opinion as to causation, only whether the standard of care for chiropractic was met; those are different standards. An opinion on causation is within the purview of the courts, not the Board.

The proposed new §80.5 keeps the Board’s current system of outside standard of care review, but clarifies to both reviewers hired by the Board and complainants that the reviewer is not authorized to make a legal opinion as to any violation of statutes or rules under the Board’s jurisdiction, nor authorized to make a legal opinion as to the liability for any injury possibly sustained by the complainant. To that end, the rule will be retitled as “Peer Review Process” to eliminate the perception that a Board reviewer is the same as an expert witness.

The Board's Executive Director, Patrick Fortner, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government. There will be no adverse effect on small businesses or rural communities, micro-businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the rule as proposed. An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed rule will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Mr. Fortner has determined that for each year of the first five years the proposed rule will be in effect the public benefit is a more accurate description of the role and limitations of individuals selected by the Board to perform standard of care reviews in complaints filed with the Board.

The Board provides this Government Growth Impact Statement, pursuant to Texas Government Code §2001.0221, for the proposed new 22 TAC §80.5. For each year of the first five years the proposed rule is in effect, Mr. Fortner has determined:

- (1) The proposed rule does not create or eliminate a government program.
- (2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions.
- (3) Implementation of the proposed rule does not require an increase or decrease in future legislative appropriations to the Board.
- (4) The proposed rule does not require a decrease or increase in fees paid to the Board.
- (5) The proposed rule does not create a new regulation.
- (6) The proposal does repeal existing Board rules for an administrative process.
- (7) The proposed rule does not decrease the number of individuals subject to the rule's applicability.
- (8) The proposed rule does not positively or adversely affect the state economy.

Comments on the proposed rule or a request for a public hearing may be submitted to Christopher Burnett, General Counsel, Texas Board of Chiropractic Examiners, 1801 North Congress Avenue, Suite 10.500, Austin, Texas 78701, via email: rules@tbce.state.tx.us; or fax: 512-305-6705, no later than 30 days from the date that this proposed rule is published in the *Texas Register*. Please include the rule name and number in the subject line of any comments submitted by email.

The rule is proposed under Texas Occupations Code §201.152 (which authorizes the Board to adopt rules necessary to perform the Board's duties and to regulate the practice of chiropractic), and §201.210 (which requires the Board to develop a review process of complaints filed with the Board that require additional chiropractic expertise).

No other statutes or rules are affected by this proposed rule.

<rule>

80.5. Peer Review Process.

- (a) During the investigation of a complaint, the Enforcement Committee may order the outside peer review of a licensee's standard of patient care or billing practices.
- (b) To qualify as a peer reviewer, a person shall:
 - (1) have an active license with the Board or appropriate professional credentials;
 - (2) have no prior violations of Board statutes or rules;
 - (3) have no open complaints;
 - (4) have no felony convictions or misdemeanor convictions for a crime of moral turpitude;
 - (5) show sufficient training or experience to offer an informed opinion;

- (6) show knowledge of accepted standards of chiropractic care in Texas or other professional standards related to the alleged violation; and
- (7) have an acceptable malpractice complaint history.

(c) A peer reviewer may not review a complaint if the peer reviewer has:

- (1) a direct financial interest or relationship with any party or witness to the complaint that gives the appearance of a conflict of interest;
 - (2) a familial relationship within the third degree of affinity with any party or witness;
 - (3) personal knowledge of any information about any party or witness related to the complaint;
- or
- (4) any other reason where the peer reviewer could not fairly and impartially consider the complaint.

(d) The Board shall maintain a list of peer reviewers and shall periodically audit the list to confirm their qualifications.

(e) Board staff shall select a peer reviewer when an investigator identifies a standard of care or other professional standard beyond the expertise of staff in the complaint.

(f) Board staff shall randomly select a peer reviewer from the list based on the peer reviewer's qualifications to review the type of complaint.

(g) The executive director shall remove a peer reviewer from the list for:

- (1) failure to maintain the required qualifications;
- (2) failure to timely complete reports;
- (3) failure to inform the Board of potential or apparent conflicts of interest; or
- (4) failure to maintain the confidentiality of any matter.

(h) The Board shall provide to the peer reviewer:

- (1) the complaint;
- (2) the investigator's report;
- (3) the Board's peer review report form; and
- (4) a contract for services.

(i) The peer reviewer shall review all relevant information to determine if a licensee violated the applicable standard of care in Texas or other professional standard and prepare a written report.

(j) The peer reviewer's report shall include:

- (1) the peer reviewer's qualifications;
- (2) the relevant facts of the complaint;
- (3) the applicable standard of care or other professional standard;
- (4) an application of the standard of care in Texas or other professional standard to the facts;
- (5) a finding of whether the standard of care or other professional standard was met; and
- (6) the clinical basis for the findings, including the use of any peer-reviewed journals, studies, or reports.

(k) A peer reviewer may not offer a legal opinion as to whether a particular statute, Board rule, or other law was violated.

(l) A peer reviewer may not offer an opinion on the legal liability of any individual for an injury sustained by a patient.

(m) The peer reviewer shall complete and return the review to the Board within 30 days, unless the peer reviewer requests more time due to the complaint's complexity.

(n) The Board shall give the peer reviewer's report to the licensee within 30 days of receipt.

(o) The Enforcement Committee shall consider the report and the licensee's response in determining if a violation occurred.

(p) The Enforcement Committee may order additional peer reviews if necessary.

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